



**Case Number:** D 0008/09

**D E C I S I O N**  
**of the Disciplinary Board of Appeal**  
**of 11 May 2010**

**Appellant:** N.N.

**Decision under appeal:** Decision of the Examination Board for the  
European Qualifying Examination dated  
11 August 2009.

**Composition of the Board:**

**Chairman:** B. Günzel  
**Members:** C. Rennie-Smith  
H. C. Hallybone

## **Summary of Facts and Submissions**

- I. The appellant appealed, by a notice of appeal both dated and received by fax at the EPO on 17 September 2009, against the decision, posted by registered letter on 11 August 2009, of the Examination Board that he had not been successful in the 2009 European Qualifying Examination ("EQE"), having been awarded 42 marks for his performance in paper C. The appeal fee was also paid on 17 September 2009. The written statement of grounds of appeal was both dated and received by fax at the EPO on 12 October 2009.
  
- II. In letters from the Board dated 18 November 2009, the President of the EPO and the President of the Institute of Professional Representatives were invited, pursuant to Articles 27(4) REE and 12 RDR, to file observations on the case within a period of two months if they wished to do so. Neither president replied.
  
- III. Although the appellant's statement of grounds of appeal refers to a main and two auxiliary requests, these are in fact not requests as such but his manner of presenting different arguments. The only actual request is that referred to in section VIII below. The appellant presented three arguments as summarised in sections IV to VI below.
  
- IV. The appellant's first argument (headed "Main Request") was that, as regards claims 1 and/or 2 of the patent to be opposed which was the subject of paper C, there had been a violation of paragraph 3 in Part I of the "Instructions to Candidates for preparing their answers" ("the Instructions" - see Supplement to OJ EPO

No. 12/2008, page 29), which requires candidates to accept and limit themselves to the facts given in the paper and not to use any special knowledge they may have of the field in question. Dealing in turn with each of claims 1 and 2, the appellant referred to the observations in the Examiners' Report published in the "EQE Compendium 2009" ("Examiners Report") regarding the contents of the prior art and explained at length why, in disagreement with the Examiners' Report and by reference to the prior art, he considered each of claims 1 and 2 could only be attacked by a candidate using his or her own knowledge in the specific technical field. Among many other points, the appellant's view differed from that in the Examiners' Report as regards the item of prior art forming Annex 3 to the examination paper.

- V. The appellant's second argument (headed "Auxiliary Request") was that there had been a violation of Rule 4(2) and (3) of the Implementing Provisions to the REE ("IPREE" - see Supplement to OJ EPO No. 12/2008, page 15) which provide for the award of marks of either 50 or more or fewer than 50 according to whether a candidate can or cannot be considered fit to practise as a professional representative before the EPO. The appellant argued that the Examination Board awarded no points for attacking claims 1 and 2 by using Annex 3 as the closest prior art and thereby failed to consider the merits of any solution to the problems in the examination paper. According to decision D 17/07, not awarding marks if the "wrong" document is chosen as the closest prior art contradicts the fit-to-practice criterion and is unfair.

- VI. The appellant's third argument (headed "Second Auxiliary Request") was that his first and second lines of argument should be considered together.
- VII. In a communication dated 18 December 2009 the Board informed the appellant of its preliminary views, which were substantially as set out in the "Reasons for the Decision" below, and concluded that, on the material then before it (that is, on the basis of the submissions in the statement of grounds of appeal - see sections IV to VI above), the appeal would have to be dismissed. The communication stated further that, if the appellant wished to make any further submissions, those should be received by, at the latest, two months after the date of receipt of the communication (thus, by 1 March 2010). The appellant did not reply to the communication and, on 1 March 2010, confirmed to the Board's registrar by telephone that he had not replied and would not be making any further submissions.
- VIII. The appellant requested, in his notice of appeal filed on 17 September 2009, that the decision under appeal be set aside and that he be awarded the grade "pass (50-100)".

### **Reasons for the Decision**

1. The appeal is admissible but not allowable.
2. It is well established by the jurisprudence of the Disciplinary Board that it only has jurisdiction in EQE matters to establish whether or not the Examination Board has infringed the Regulation on the European

Qualifying Examination ("REE") or a provision implementing the REE. This follows from Article 27(1) REE which is the basis of the Board's jurisdiction in EQE matters and which reads:

"An appeal shall lie from decisions of the Board and the Secretariat only on grounds of infringement of the Regulation or of any provision relating to its application."

Thus the Disciplinary Board may only review Examination Board decisions for the purposes of establishing that they do not infringe the REE, its implementing provisions or a higher-ranking law. It is not the task of the Disciplinary Board to reconsider the examination procedure on its merits nor can it entertain claims that papers have been marked incorrectly, save to the extent of mistakes which are serious and so obvious that they can be established without re-opening the entire marking procedure. All other claims to the effect that papers have been marked incorrectly are not the responsibility of the Disciplinary Board of Appeal. Value judgments are not, in principle, subject to judicial review. (See, for example, D 1/92 (OJ EPO 1993, 357), points 3-5 of the Reasons; D 6/92 (OJ EPO 1993, 361), points 5-6 of the Reasons; and D 7/05 (OJ EPO 2007, 378), point 20 of the Reasons).

3. The appellant, whose arguments must be seen in the light of this principle, is aware of it since he has presented his arguments as alleged violations of provisions relating to the application of the REE, namely paragraph 3 in Part I of the Instructions and Rule 4(2) and (3) IPREE.

4. As regards the appellant's first argument, paragraph 3 of the Instructions reads:

"Candidates are to accept the facts given in the paper and to limit themselves to these facts. Whether and to what extent these facts are used is the responsibility of the candidate. Candidates are not to use any special knowledge they may have of the field in question."

While the appellant himself may well believe that claims 1 and 2 could only be attacked by a candidate using his or her own knowledge in the specific technical field, that is no more than his personal opinion (indeed, the expression "according to my point of view" prefaces part of his comments on page 3 of his statement of grounds of appeal). As almost all of his submissions on pages 1 to 3 of his statement of grounds of appeal amply illustrate, his opinion is at some considerable variance from the opinion of the examiners contained in the Examiners' Report. There can be no violation of the requirement that candidates are not to use any special knowledge they may have just because one candidate holds the opinion that such use is necessary. Such differences of opinion simply reflect value judgments which, as stated above (see point 2) are not subject to judicial review.

5. As regards the appellant's second argument, Rule 4(2) and (3) IPREE provide as follows:

"(2) A mark of 50 or more shall be awarded where, on the merits of that paper alone, a candidate can be considered fit to practise as a professional

representative before the European Patent Office. The grade "PASS" shall be awarded for that paper.

(3) Fewer than 50 marks shall be awarded where, on the merits of that paper alone, a candidate cannot be considered fit to practise as a professional representative. Subject to paragraph 4, the grade "FAIL" shall be awarded for that paper."

The appellant argues that, as decision D 17/07 held that awarding no marks if the "wrong" document is chosen as the closest prior art contradicts the fit-to-practice criterion, the Examination Board was wrong to award no marks for an attack on claims 1 and 2 using Annex 3 as the closest prior art.

6. However, the Board cannot see the source of the appellant's contention that the Examination Board awarded no points for attacking claims 1 and 2 using Annex 3 as the closest prior art. There is no statement to that effect in the Examiners' Report. On the contrary, the Examiners' Report says:

"In addition to the possible solution marks were awarded for other plausible, well-reasoned attacks" (see Examiners' Report, page 1, General Comments, paragraph 3, last sentence).

As already mentioned, it is abundantly clear that the appellant and the examiners who assessed his answer paper had quite different views on the contents of the prior art and it is therefore entirely unsurprising that they should also differ as to the correctness of the appellant's answers.

7. In decision D 17/07 relied on by the appellant, in which no points had been awarded to any candidates who supplied certain answers, the Board stated (see point 5 of the Reasons):

"However, awarding points for an (in the examination committees' and/or Examination Board's view) incorrect yet logical and, in keeping with the recognised practice, justified attack, is not just due practice but is also legally prescribed: under Rule 4(2) and (3) IPREE the number of points to be awarded for every paper (on a scale of 0 - 100) is based on how and to what extent "on the merits of that paper alone, a candidate can be considered fit to practise as a professional representative". This is not reconcilable with marking an examination paper as if it were a list of unrelated individual questions (as in a multiple-choice system) to which there is only one correct answer. On the contrary, the fit-to-practice criterion obliges the examiners in marking the individual parts of the answers not to disregard their merit in the context of the examination paper as a whole (D 3/00, OJ EPO 2003, 365, point 3 of the Reasons for the decision) and the need to allow for fair marking of answers which deviate from the scheme but are reasonable and competently substantiated (D 7/05 OJ EPO 2007,378, head note II). This is something to which every candidate has a legal entitlement."

The present Board concurs with that statement. However, it has no application in the present case since the Board can see no evidence that the appellant's answer, or any part thereof, was awarded no marks just because



it was "wrong" or that the merits of the appellant's answers were not properly considered. There is no apparent basis for concluding that the examiners assessed the appellant's answers to paper C other than in accordance with the fit-to-practice criterion and that the points they awarded the appellant were those they considered his answers to the paper merited. The appellant understandably disagrees but, again, that is simply a difference of opinion reflecting value judgments which are not open to review in proceedings before the Board.

8. As regards the appellant's third argument - that his first and second arguments should be considered together - it must follow that, if neither of those arguments can succeed individually, nothing can be achieved by their combination.
  
9. Despite the presentation of the appellant's arguments as alleged violations of implementing provisions of the REE, it seems clear that this appeal only discloses a difference of opinion between the appellant and the examiners and that, as the only request makes clear, what the appellant seeks in effect is the reconsideration of his answer paper and the award of higher marks. However, that is a course which is not open to the Disciplinary Board for the reasons given above (see point 2). Accordingly the appeal must be dismissed.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:

P. Martorana

B. Günzel